together, these constraints require wide-area SMR operators to "piece together" non-contiguous spectrum at frequencies that vary from site to site.[508]

271. In the event the Commission imposes a spectrum cap, Nextel contends that wide-area SMR licensees should never be charged with greater than 5 MHz of wide-area SMR spectrum in a given service area so long as SMR spectrum is licensed on a station-by-station non-contiguous basis, and a licensee should be free to demonstrate that it has an even lower equivalent spectrum yield based on its actual assignments.

272. Nextel supports this proposal with examples drawn from its experience as an SMR licensee in San Francisco and Houston. In San Francisco, Nextel calculates that the channel licenses it has applied for or been granted provide an average equivalent yield of 7.8 MHz, approximately 31 percent of the 25 MHz spectrum assigned to each cellular licensee. In Houston, Nextel asserts that the equivalent yield is 5.7 MHz or 23 percent of cellular. Nextel claims that these comparisons actually overstate the equivalent yield because SMRs must use non-contiguous spectrum and proportionately more control channels.[509]

273. Other wide-area SMR commenters state similar views.[510] Some commenters also contend that a spectrum cap would inhibit the ability of SMRs to attract capital investment needed to establish systems capable of competing with other CMRS providers.[511]

274. The issue presented to us is whether the various characteristics of wide-area SMR licensees -- that they are newer and smaller than cellular carriers, do not currently possess market power, and use spectrum subject to important encumbrances -- justify some difference in applying the cap on broadband terrestrial mobile spectrum to SMR licenses.

(2) *Discussion*

275. While we conclude that SMRs should be subject to spectrum aggregation limits, we also find that the arguments of Nextel and other SMRs that SMR spectrum is not currently equivalent to cellular or broadband PCS spectrum have some merit. SMR spectrum is encumbered in comparison with cellular. The biggest problem is that SMR channels are assigned on a station-by-station basis. A licensee with a station in a given market is limited to a greater degree than cellular in its ability to reconfigure by the existence of neighboring

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[508] Nextel Comments at 28-31.

[509] *Id.* at 28-34.

[510] *See* AMTA Comments at 32-34; OneComm Comments at 13-14; Pittencrieff Comments at 16; Dial Page Comments at 3-4.

[511] AMTA Comments at 32; Comcast Comments at 11-12; OneComm Comments at 12-13; Pittencrieff Comments at 15-16; Dial Page Comments at 4.

co-channel users. In addition, SMR spectrum is not available as a contiguous block. Therefore, even if a licensee has more than 10 MHz, we will attribute a maximum of 10 MHz of SMR spectrum to that entity.[512] These 10 MHz are equivalent to the largest possible block of *contiguous* SMR spectrum. This 10 MHz SMR attribution within the 45 MHz cap on cellular-SMR-PCS spectrum is less restrictive than the 5 MHz SMR attribution recommended by Nextel with the proposed 40 MHz cap. Under the rule we are adopting, an entity with under 5 MHz of attributable SMR spectrum is eligible for up to 40 MHz of broadband PCS spectrum.

b. Attributable Cross-Ownership

276. We proposed a 5 percent cross ownership limitation for the general CMRS cap.[513] Most commenters believe that such a rule would be too restrictive. AirTouch, for example, stated that such a rule would defeat the Commission's goal of fostering diverse and competitive services.[514] In broadband PCS and cellular, cross-ownership attribution levels are 20 percent. Because use of another limit in this context could create inconsistent results,[515] we are adopting a 20 percent cross-ownership attribution rule for purposes of this SMR, broadband PCS, and cellular spectrum aggregation limit.[516] Thus, entities with 20 percent or more ownership of an SMR with over 5 MHz of spectrum in a MTA or BTA are effectively limited to 30 MHz of broadband PCS spectrum in that geographic market.

277. In determining attribution when cellular, broadband PCS and SMR licensees are held indirectly through intervening corporate entities, we will use the multiplier adopted in

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[512] Consistent with our approach in PCS, we will not attribute backhaul spectrum for the purposes of counting spectrum towards the cap.

[513] *Further Notice*, 9 FCC Rcd at 2884 (para. 101).

[514] AirTouch Comments at 18.

[515] The Federal Accounting Standards Board (FASB) explicitly states that ownership interests below 20 percent presumptively do not have control and above 20 percent they do unless evidence to the contrary is established. FASB Accounting Principles Board Opinion No. 18 (1970). We will continue, however, to maintain the within-service attribution thresholds for both PCS and cellular at 5 percent. Thus, an entity with 5 percent or more ownership of a cellular licensee in one market generally may not own more than 5 percent of the other licensee. *See* 47 CFR §§ 22.945 and 24.204, which include limited exceptions for certain entities such as investment companies, and a multiplier for indirectly held interests.

[516] This decision has no effect on our rule attributing ownership interests of 5 or more percent for purposes of the 40 MHz cap on broadband PCS ownership interests in any geographic area. *See* 47 CFR § 24.229(c).

the *Broadband PCS Further Order On Reconsideration,*[517] rather than a bright-line cross-ownership attribution standard. That multiplier is currently used by the Commission in the attribution rules in the broadcast context. It is also consistent with the FASB language above that discusses both direct and indirect ownership interests. Finally, we adopt several additional attribution rules that are consistent with the broadband PCS-cellular cross-ownership attribution rules.[518] These additional rules provide that officers and directors have an attributable interest in their company, non-voting stock in excess of the levels discussed in this paragraph is attributable, stock interest held in trust is attributable to those who have or share the power to vote or sell the stock, debt and instruments such as warrants with rights of conversion to voting interests are generally not attributable until conversion is effected, and limited partnership interests are attributable.

c. Designated Entities

278. We also sought comment on whether to apply a different standard for designated entities, *i.e.*, minorities and women, rural telephone companies, and small businesses, to ensure their full participation in the developing CMRS market.[519] Although there was little comment on this subject in this proceeding, we are extending the 40 percent cellular attribution rule for entities with non-controlling cross ownership in PCS as subsequently adopted in the *Broadband PCS Reconsideration Order* to SMRs.[520] Therefore, an entity may hold up to a 40 percent non-controlling interest in SMR licensees before its SMR interest will be deemed attributable for purposes of this cellular-PCS-SMR spectrum cap, but must limit its participation in a PCS licensee controlled by women or minority group members to a non-controlling interest. In addition, any designated entity with a non-controlling interest in an SMR licensee of less than 40 percent will not be deemed to have an attributable interest.

d. Geographic Attribution

279. We proposed and are adopting a 10 percent population overlap threshold. A provider's spectrum counts toward the cellular-PCS-SMR spectrum cap if the carrier is

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[517] Amendment of the Commission's Rules To Establish New Personal Communications Services in the 2 GHz Band, GEN Docket No. 90-314, Further Order on Reconsideration, FCC 94-195, released July 22, 1994 (*Broadband PCS Further Order on Reconsideration*).

[518] *See* 47 CFR § 24.204(d).

[519] *Further Notice*, 9 FCC Rcd at 2884-85 (para. 103).

[520] *Broadband PCS Reconsideration Order*, at paras. 125-127. "Control" is defined in our Broadband PCS competitive bidding order. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, FCC 94-178, released July 15, 1994, at para. 164.

licensed to serve 10 percent or more of the population of the MTA or BTA.[521] Of the commenters, only AMTA disagreed with this approach.[522] This is consistent with the standard adopted in the *Broadband PCS Reconsideration Order*.[523] To apply this rule to SMRs licensed on a station-by-station basis, we will presume that the SMR service area covers less than 10 percent of population of an MTA or BTA if none of the SMR's base stations is located inside the PCS service area. If any of the SMR's base stations are located inside the PCS service area, the channels licensed at those sites will be presumed to cover 10 percent of the population and count towards the spectrum cap unless the licensee shows that its protected service contour (40 dBu) for all of its base stations covers less than 10 percent of population of the PCS service area.

e. Calculation of Attributable SMR Spectrum

280. To calculate attributable SMR spectrum towards the cellular-PCS-SMR spectrum cap, we count all SMR channels meeting the 10 percent population benchmark in the PCS service area as discussed in paragraph 279. Both 800 and 900 MHz channels count towards this limit. RMD opposed including 900 MHz in any spectrum cap due to the small amount of spectrum and the narrow channel bandwidth.[524] Extending the cap from the proposed 40 MHz to 45 MHz does not impact PCS eligibility for an entity that only has SMR licenses in the 900 MHz band, because there is only 5 MHz SMR spectrum in the 900 MHz band. Since high quality mobile telephony service can be provided on 900 MHz SMR channels and there is the possibility of aggregating up to 5 MHz of spectrum in this band, there seems no compelling reason to exclude those channels.

281. Thus, to calculate whether attributable SMR spectrum exceeds 5 MHz, the threshold that results in an impact on PCS eligibility, all attributable SMR base stations inside the MTA or BTA must be identified. To compute an SMR spectrum total, the licensee must count all the 800 MHz channels and 900 MHz channels. All 800 MHz and 900 MHz channels located on at least one of those identified base stations count as 50 kHz (25 kHz pairs) and 25 kHz (12.5 kHz pairs), respectively. This total can be reduced using the 10 percent test discussed in paragraph 279.

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[521] *Further Notice*, 9 FCC Rcd at 2884 (para. 102). For example, if a cellular carrier's cellular service area covers 10 percent or more of an MTA or BTA, that carrier is considered to be in the MTA or BTA and is attributed with 25 MHz of spectrum for purposes of the cap.

[522] AMTA Comments at 33-34. APC and New Par agree with this approach. APC Comments at 3; New Par Comments at 18.

[523] *Broadband PCS Reconsideration Order*, at para. 136.

[524] RMD Reply Comments at 5.

282. This approach is relatively simple and fair. It is simple, because the calculation requires identifying only base stations located in the MTA or BTA, listing the channels and using a straight-forward multiplication. Where more than one SMR might have base stations for a given channel in a specific market, the SMR may feel disadvantaged. We note, however, that for PCS licensing this is very similar to cases where a cellular carrier MSA overlaps an MTA or BTA, but does not fully cover the market.

f. Timing

283. With regard to timing, some commenters question whether the spectrum cap proposed in the *Further Notice* may be imposed on SMRs that do not obtain full CMRS legal status until August 10, 1996.[525] Other commenters, however, argue that application of a CMRS spectrum cap to grandfathered SMR licensees is necessary to avoid regulatory disparity.[526] We believe these issues warrant further examination.

284. We will require PCS, cellular and SMR applicants to certify at the time of licensing that they are in compliance with the provisions of the cap.[527] The Commission will retain authority to determine questions of compliance and to take appropriate enforcement measures if an entity is found to have excessive PCS, cellular, or SMR interests with this cap. We will delegate authority to the appropriate Bureau to develop a new form or modify existing forms for licensees to make this certification and/or provide information showing they are in compliance with the cap.

285. Finally, paralleling our decision regarding cellular interests, we are allowing firms with interests in SMR licenses to divest themselves of their SMR interests after the PCS auction so that they come into compliance with our rules after they know the results of the auction. We are not limiting this divestiture to small population overlaps because given their current market positions, we are not as concerned about the incentives of SMR operators strategically delay the introduction of PCS as we are about the incentives of cellular operators.

E. Licensing Rules and Procedures

1. *Application Forms and Procedures*

a. Background and Pleadings

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[525] *See* AMTA Reply Comments at 9-10; Dial Page Comments at 5 n.4 (arguing a spectrum cap should only apply prospectively after August 1996); Motorola Reply Comments at 21; Nextel Reply Comments at 27-30; *see also* OneComm Comments at 13.

[526] New Par Comments at 19-20; Southwestern Bell Comments at 16-17.

[527] *See* Form 600, Appendix A.

286. In the *Further Notice* we proposed to adopt a unified application form that would be used by all CMRS and PMRS applicants in all terrestrial mobile services. The proposed form, FCC Form 600, would replace both Form 401 (used under Part 22) and Form 574 (used under Part 90).[528] We tentatively concluded that the form, as proposed, provides several advantages. Specifically, the new form would simplify the application process, limit the information requested to relevant data, and facilitate electronic filing and automated information entry. We proposed further to use Form 600 to determine the regulatory classification of the applicants.[529]

(1) *Single Application Form*

287. Most commenters favor the adoption of a single application form for all CMRS and PMRS applicants.[530] Nevertheless, several recommend that we defer adoption of Form 600 until the industry acquires a greater familiarity with it and thus is in a better position to assess its efficacy.[531] A majority of the commenters criticize the fact that the Commission still requires applicants to file microfiche copies of their applications and they implore the Commission to adopt procedures for electronic filing.[532]

288. Only two commenters, Brown and Omnipoint, have voiced general dissatisfaction with the proposal. Brown contends that the effort to combine a wide variety of disparate radio services and merge the processing philosophies of the Common Carrier Bureau and the Private Radio Bureau is likely to lead to less satisfactory results than will the continued use of different application forms for different types of radio services.[533] Omnipoint urges us to modify the form by adopting a blanket license approach, rather than a site-specific approach, for broadband PCS licensees. Citing Section 24.11(b) of the Rules,

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[528] *Further Notice*, 9 FCC Rcd at 2886 (para. 109).

[529] *Id.* (paras. 110-112).

[530] *See, e.g.*, APACG Comments at 5; APACG Reply Comments at 2-3; APC Comments at 5; Bell Atlantic Comments at 13-14; GTE Comments at 13; McCaw Comments at 31; NABER Comments at 38; PCIA Comments at 22; PCIA Reply Comments at 15; RAM Tech Comments at 22; UTC Comments at 4.

[531] *See, e.g.*, APACG Comments at 5; Celpage Comments at 23; Dial Page Reply Comments at 9; GTE Comments at 13; Metrocall Comments at 23; NABER Reply Comments at 4; Network USA Comments at 23; Nextel Reply Comments at 45-46; PCIA Comments at 22; PCIA Reply Comments at 16.

[532] *See, e.g.*, Brown Comments at 25; Celpage Comments at 24; Metrocall Comments at 24; Network Comments at 24; LegalCom Comments at 2; RAM Tech Comments at 22-23; PCIA Comments at 40.

[533] Brown Comments at 21-28.

Omnipoint claims that the site-specific applications that would be required by Sections C and F of Form 600 apply to PCS.[534]

289. Most of the commenters suggest that some type of format modification be effected before Form 600 is adopted. Some recommend that the form be repackaged to separate clearly those questions that pertain solely to CMRS from the questions that apply to both CMRS and PMRS applicants.[535] Some think that the form should be condensed.[536] NABER, for instance, recommends moving the text of qualification and certification questions to the instructions and having the applicant sign a simple statement of general compliance with the requirements.[537] Some commenters quarrel with the specific technical information the form requests. A typical example is the GTE claim that requiring geographic information based on the North American Datum of 1927 (NAD 27), which has been superseded by the North American Datum of 1983 (NAD 83), will cause confusion and lead to errors.[538]

(2) *Regulatory Classification of Applicants*

290. Response to the proposal to employ Form 600 as a vehicle for determining the regulatory classification of an applicant is limited. Only three commenters directly address the proposal and all three generally support the idea of a single unified application form.[539] One of the commenters, however, conditions its support on the form not being unnecessarily complicated.[540]

(3) *Single Cut-Over Date*

291. PCIA recommends a single cut-over date for all services using the new form to ensure a smooth transition, which would benefit the Commission and CMRS applicants. A single cut-over date would decrease the likelihood of the Commission receiving superseded application forms and the attendant repetitious task of processing the forms. A single cut-over

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[534] Omnipoint Comments at 1-7; *see also* Pacific Reply Comments at 10.

[535] *See, e.g.*, API Comments at 4; Brown Comments at 24-25; ITA/CICS Comments at 9; NABER Comments at 38; UTC Comments at 4-5.

[536] *See, e.g.*, Brown Comments at 30-33; Celpage Comments at 23-24; Metrocall Comments at 23; NABER Comments at 38-40; Network Comments at 23.

[537] NABER Comments at 38-40.

[538] GTE Comments at 13; *see also* Brown Comments at 32; McCaw Comments at 32-33.

[539] *See* AMTA Comments at 36; CTIA Comments at 4; and PCIA Comments at 22-23.

[540] AMTA Comments at 36.

date would also minimize confusion among small entities that have only limited, irregular need to file applications with the Commission, and it would enable large carriers that utilize a computerized version of the application to make a single change in their software. PCIA suggests deferring use of the new form until six months after the final form has been published in the Federal Register, which it believes would give everyone adequate lead time to implement the new requirements. It notes that the Budget Act appears not to require CMRS entities to use the same form as of August 10, 1994.[541]

(4) *Notification of Construction*

292. In addition to the adoption of Form 600, PCIA recommends the adoption of a new standardized, modular notification of status of facilities form. It also believes that the Commission should reconsider revision to our certification of completion of construction procedures. Specifically, it encourages the Commission to adopt procedures similar to those we utilize for Part 90 licensees, by which they receive a computer-generated Form 800A notification near the end of the construction period requesting confirmation that construction has been completed. In the event a permittee or conditional licensee does not respond after two such notices, a final computer-generated notice is mailed, indicating that the license will be terminated in the event a response is not received within a stated time. PCIA submits that this process has significant benefits for permittees, and, because it is almost entirely automated, requires little of the Commission's resources to administer.[542]

b. Discussion

(1) *Single Application Form*

293. We will not defer adoption of Form 600. Although we appreciate the concern of the commenters who claim that requiring the immediate use of the form may lead to some confusion, we firmly believe that our reclassification of Part 90 and Part 22 licensees as CMRS providers in the *CMRS Second Report and Order* will generate more confusion if use of the new form is delayed. Although these licensees, especially those currently licensed under Part 90, are familiar with their respective license application forms, *i.e.*, Form 574 and Form 401, these forms were not designed, as is Form 600, to meet the requirements of the new CMRS and PMRS regulatory classifications established by Congress. Consequently, attempting to use Forms 574 and 401 until applicants are more familiar with the requirements of Form 600, we believe, will hinder the transition to CMRS.

294. The dissatisfaction with microfiche is also appreciated. Similar concerns were raised by commenters in the *Part 22 Rewrite* proceeding. As we explained there, while we recognize that the microfiche requirement is somewhat burdensome, it is, nevertheless,

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[541] PCIA Comments at 24.

[542] *Id.* at 24-25.

necessary because the Commission currently lacks adequate file space to maintain full-size paper station files. Microfiche, therefore, provides the best interim solution until we are able to implement procedures for electronic filing.[543] Objection to the requirement that applicants base their geographical information on NAD 27 rather than NAD 83 data is also understandable. Like the microfiche requirement, use of NAD 27 is an interim obligation that must be maintained until the Commission completes our conversion to NAD 83.[544] Form 600 provides space for coordinates based on NAD 83, which is required by the Federal Aviation Administration (FAA), in order to accommodate applicants who desire to provide the information as a means of clarification as to the accuracy of the coordinates they have furnished. No applicant is obligated, however, to include NAD 83 information in its application.

295. We reject the suggestions that the text of some questions should be moved to the instructions as a means of shortening Form 600. Any benefit derived from this suggestion would be, at best, illusory. The same amount of text must be read by an applicant, whether it is located in the instructions or in the application. More importantly, juxtaposing text and questions in these matters diminishes the likelihood of applicant error and the possibility of a resulting dismissal of an application. This is especially true when the inquiries concern an applicant's response to the qualification and certification questions, which are of principal importance in determining its fitness to be a Commission licensee. Similarly, we do not believe that other suggested format modifications are warranted, at least at this point. Given the fact that nearly all of the commenters are generally satisfied with Form 600, we believe it would be wiser to withhold modifying the form until applicants become more familiar with it. We fear that attempting to fine tune Form 600 at this stage may create more problems than it solves. Any practical problems that become apparent after the form is in use can be resolved by subsequent revisions to the form.

296. Finally, in response to the argument that Form 600 is at odds with the Rules because of its alleged requirement that broadband PCS file site-specific information, we note that the issue of whether Form 600 should require PCS licensees to file site data in those instances in which the proposed location of a station causes a recognized concern about either significant effects on the environment or international coordination, will be addressed in a rule making we will initiate in the near future regarding final Part 24 rules for PCS.

(2) *Regulatory Classification of Applicants*

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[543] *See Part 22 Rewrite Order,* Appendix A (discussion of Section 22.105).

[544] *See* Public Notice, "FCC Interim Procedure for the Specification of Geographic Coordinates," DA 88-316, 3 FCC Rcd 1478 (1988); Public Notice, "The Federal Communications Commission Continues To Require Applicants To Use Coordinates Based on the North American Datum of 1927," DA 92-1188, 7 FCC Rcd 6096 (1992).

297. We will adopt our proposal to use Form 600 for determining the appropriate regulatory classification of all mobile services, based on an applicant's response to questions of whether the service it proposes to provide meets the three criteria of the statutory definition of CMRS. The comments confirm our tentative conclusion that this procedure provides both an independent basis for verifying that the applicant's requested classification is consistent with the nature of the service it intends to offer, and an effective check against misrepresentation.

(3) *Single Cut-Over Date*

298. We agree with PCIA's assessment that both CMRS applicants and the Commission would benefit from a smooth transition in the use of a newly adopted Form 600, and that in order for this to happen, there should be a single cut-over date, applicable to services using the form. We disagree, however, with its suggestion that the cut-over date should occur after the transition to CMRS has been completed. Using superseded application forms, even for a limited time, after the new rules are in effect would subject applicants and the Commission to needless processing burdens. The cut-over date for using the Form 600 will, therefore, be the same date that the rule changes we are adopting today become effective. Since the Rules generally require publication in the Federal Register to occur not less than 30 days before any rule issued by the Commission takes effect, we believe that all concerned parties will have sufficient lead time to familiarize themselves with the Form 600.[545]

(4) *Notification of Construction*

299. The adoption of a standardized notification of construction form for use in connection with all CMRS licenses is a valid and worthwhile proposal. We conclude, however, that the development of such a form requires further analysis. Accordingly, exploration of possible formats and revision of the notification procedures must await a subsequent Further Notice of Proposed Rule Making which we intend to issue. This proceeding also will examine PCIA's suggestion that procedures patterned after those used for Part 90 licenses should be adopted for use in connection with CMRS.

2. *Qualifying Information*

a. Background and Pleadings

300. Our current licensing procedures require Part 22 applicants to provide certain qualifying information that is not required of Part 90 applicants. For example, because common carriers are subject to the alien ownership restrictions of Section 310(b) of the Act,

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[545] *See* 47 CFR § 1.472(a).

Part 22 applicants must disclose any alien ownership or control.[546] Section 308(b) of the Communications Act authorizes the Commission to prescribe regulations relating to citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station, including certification that the applicant has not violated the Anti-Drug Abuse Act of 1988.[547] Consequently, Part 22 applicants must disclose ownership interests of 5 percent and greater as well as certain information about the parties holding these interests that the Commission has determined to be relevant to assessing their qualifications.[548]

301. In the *Further Notice*, we proposed to require all CMRS applicants, including Part 90 applicants that request CMRS station classifications, to disclose on Form 600 any ownership or control interest in the applicant held by an alien.[549] This disclosure is identical to the disclosure currently required of Part 22 applicants on Form 401.

302. McCaw contends that all CMRS applicants should be required to provide comparable qualifying information.[550] Bell Atlantic claims that the *Further Notice* creates an ambiguity in stating that Part 22 applicants must disclose whether they or "any controlling party" have had Commission licenses revoked, whereas the current Form 401 and Section 22.13 of the Commission's Rules apply to "any party", not just controlling parties.[551] Bell Atlantic argues that the disclosure requirements should apply only to the applicant or a controlling party since any broader application would require disclosure from individuals or entities with little relationship to the applicant and with no control over operations.[552] Bell Atlantic contends that such obligations are not imposed upon Part 90 licensees, and insists that as long as applicants and "controlling parties" are disclosed, the Commission's need to identify "real parties in interest" is satisfied. As such, Bell Atlantic requests that the Commission revise Section 22.13 of our Rules, as well as the parallel provision for PCS, Section 24.13 of the Commission's Rules.[553]

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[546] Part 90 applicants are required only to certify compliance with Section 310(a), which bars foreign governments and their representatives from holding any Commission license. *See* Form 574, Certification No. 4.

[547] 47 U.S.C. § 308(b).

[548] *See* Form 401.

[549] *Further Notice*, 9 FCC Rcd at 2887 (para. 114).

[550] McCaw Comments at 34.

[551] Bell Atlantic Comments at 14 (*citing* 47 CFR § 22.13 current rule).

[552] *Id.*

[553] *Id.* at 15.

303. PageNet argues that the Commission should revise proposed Form 600 to alert partnerships that they must observe the alien ownership restrictions imposed in *Wilner & Scheiner*.[554] PageNet further alleges that Form 600 sweeps too broadly in requiring information on denial of applications, claiming that denial of an application for technical or formal deficiencies has no relevance to the assessment of later applications.[555]

b. Discussion

304. We conclude that the proposal set forth in the *Further Notice* should be adopted with some modifications. Section 310(b) prohibits the grant of radio licenses, including licenses for common carrier service, to aliens and to corporations with specific levels of alien ownership or control. For purposes of Section 310(b), we have determined that certain partnership interests, as well as certain other interests held by non-corporate entities and associations, may be considered ownership interests.[556] These policies and rules continue in effect and shall apply to all CMRS licensees, including those grandfathered Part 90 licensees who are not granted waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993.[557]

305. We reject Bell Atlantic's proposal that we amend Part 22 of the Commission's Rules, and Form 401, to require qualifying information only from the applicant or a controlling party. This information is relevant to the Commission's review of license applications. Without it, we would be unable to carry out our statutory obligations. For instance, because alien ownership of a licensee may never exceed 25 percent, requiring

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[554] PageNet Comments at 31-32 (*citing* Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, 103 FCC 2d 511 (1985) (*Wilner & Scheiner*), *recon. in part*, 1 FCC Rcd 12 (1986).

[555] PageNet Comments at 32.

[556] *See Wilner & Scheiner*, 103 FCC 2d at 520 (position occupied by general partners in a partnership is directly comparable to that of officers and directors in a corporation); *see also* Moving Phones Partnership, L.P. v. FCC, 998 F.2d 1051, 1055-57 (D.C. Cir. 1993), *cert. denied sub nom.* Cellswitch L.P. v. FCC, -- U.S. --, 114 S.Ct. 1369 (1994) (Commission acted reasonably in rejecting applications on ground that partnerships had aliens among their general partners, and in not exempting from alien restriction partnerships in which alien general partners contractually relinquished control and management).

[557] In the First Report and Order in this docket, we established procedures for private mobile services reclassified as CMRS to file waiver petitions to retain existing foreign ownership interests. Those parties with approved waivers are exempt from the Section 310 only to the extent indicated in their waivers. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, First Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994). Thirty-three licensees have submitted waiver requests. These will be addressed in a separate order.

qualifying information only from controlling parties of a licensee would not provide us with sufficient facts to determine that at least 75 percent of ownership interests in the licensee is in the hands of American citizens. In addition to ensuring compliance with citizenship requirements, we are also obligated to ensure that radio licenses do not fall into the hands of persons lacking good character, *e.g.*, convicted felons and persons seeking to monopolize control of radio frequencies, and although a 5 percent ownership interest in a licensee would not result in control, a party holding an interest ranging from 5 percent to 49.9 percent could strongly influence the party or parties legally controlling the licensee. This is especially true in the case of larger corporate licensees. Lastly, the Anti-Drug Abuse Act of 1988, which applies to those Part 90 services that are reclassified as CMRS, requires certification from every owner of 5 percent of a licensee.

306. We do not believe that supplying this information imposes any undue burdens on parties. Aside from being extremely limited in scope, the information is sought only from those parties holding a 5 percent or greater ownership interest in a licensee. Consequently, no more than 20 persons would be subject to this nominal requirement with respect to any licensee. Further, in the *Part 22 Rewrite Order*, the Commission determined that these rules should remain intact.[558] Therefore, we do not find a compelling public interest reason for amending these rules. All parties to a CMRS application are required to comply with the alien ownership requirements specified in Section 310 of the Act and they must also disclose whether: (1) the party has had a Commission license or permit revoked or an application denied by the Commission; (2) the party has been found by a court to have monopolized radio communication; or (3) the party has been convicted of a felony. Parties also must certify that they have not violated the Anti-Drug Abuse Act of 1988.

3. *Application Fees*

a. Background and Pleadings

307. Under our current licensing procedures, Part 22 applicants pay an application filing fee of $265 per application for cellular and for non-cellular services, while the fee for Part 90 applications is $35 per call sign.[559] The reclassification of some Part 90 services as CMRS raises the issue of whether Part 90 CMRS applicants should be required to pay the same filing fee as Part 22 applicants. In the *Further Notice* we proposed to require all CMRS applicants in Part 90 services to pay the higher common carrier application fee.[560]

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[558] *See Part 22 Rewrite Order*, Appendix A (discussion of Sections 22.107, 22.108).

[559] *See* 47 CFR §§ 1.1102 (private radio fee schedule), 1.1105 (common carrier schedule). *See also Further Notice*, 9 FCC Rcd at 2887 (para. 115). The fees for Part 22 licensees were increased by the Commission from $230 to $265, effective July 18, 1994.

[560] *Further Notice*, 9 FCC Rcd at 2887 (para. 115).

308. Several commenters support the proposal for uniform fees.[561] Bell Atlantic and CTIA argue that regulatory symmetry compels adoption of the proposal that Part 90 and Part 22 licensees pay the same application and user fees.[562] APACG and PageNet support equivalent fees for similar services, but contend that the lower fee schedule would be more appropriate as a result of streamlined licensing.[563] PCIA argues that there should be a common application fee for substantially similar CMRS operators, which should be assessed on a "per application" basis to the extent permissible under Section 8 of the Act. PCIA also asserts that CMRS providers should be required to conform to the common carrier fee filing schedule for the various classes of notifications relating to the status of facilities.[564] NABER agrees that similar services should be charged the same application and regulatory fees, but suggests that the Commission justify such charges based on the processing and other functions to be performed by the Commission.[565] Nextel and Pagemart contend that raising application fees for Part 90 licensees would result in substantial and unreasonable burdens upon many CMRS providers.[566] Pagemart argues that such increased fees are not necessary or practical, and therefore would be contrary to the congressional mandate.[567]

309. Brown and other commenters assert that the Commission does not have the authority to revise the fee schedule.[568] Brown argues that had Congress intended to change the fees in any way, it would have done so, or expressly granted the Commission the

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[561] *See* AMTA Comments at 36-37 (regulatory parity should extend to fees but not until the Commission has reconciled our regulatory structures so that substantially similar services are regulated on a comparable basis); Bell Atlantic Comments at 15; CTIA Comments at 5; McCaw Comments at 34; New Par Comments at 20-21; *see also* E.F. Johnson Comments at 20 (wide-area SMRs should pay the $230 fee, but local SMR operators should pay the $35 fee); .

[562] Bell Atlantic Comments at 15; CTIA Comments at 5.

[563] APACG Comments at 6; APACG Reply Comments at 6-7; PageNet Comments at 30.

[564] PCIA Comments at 27-28; PCIA Reply Comments at 18.

[565] NABER Comments at 40-41. *Cf.* NABER Reply Comments at 17 (equalizing filing and regulatory fees at this time when the licenses are not similar results in cosmetic parity which would disadvantage Part 90 licensees).

[566] Nextel Comments at 47; Nextel Reply Comments at 41 (urging retention of the $35 application fee per application for SMR and wide-area SMR applicants pending adoption of wide-area SMR block licensing); Pagemart Comments at 11-12; Dial Page Reply Comments at 8-9 (advocating adoption of a single call sign for wide-area SMRs); Southern Reply Comments at 14.

[567] *See* Pagemart Comments at 11-12. *See also* Celpage Comments at 25-26.

[568] Brown Comments at 20; PCC Comments at 10-11.

authority to do so.[569] Brown and PCC contend that the inaction of Congress regarding this issue in Section 8 of the Act means that the Commission's authority to revise the fee schedule is limited to biennial adjustments in accord with the Consumer Price Index.[570] PCC asserts that Section 6002(d)(3) of the Budget Act, contrary to the Commission's assertions in the *Further Notice*, requires only that the Commission assure that licensees in substantially similar services are subject to "technical requirements that are comparable . . . ." PCC argues that fees are financial, not technical, requirements and therefore should not be included in this proceeding.[571] PCC further argues that the silence of Congress on the filing fee structure in Section 8 should be contrasted with its explicit grant of authority to the Commission to amend the regulatory fees imposed by Section 9 of the Act.[572]

b. Discussion

310. The record is inconclusive on the question of whether Part 90 licensees should be required to comply with the same application fee schedule as Part 22 licensees. We find, however, that this is an issue appropriately to be decided by Congress. As certain commenters have noted, Congress has not granted the Commission the authority to amend the application fee schedule. Thus, we conclude that we may not take any action to change the application fee schedule in this proceeding. Consequently, reclassified Part 90 licensees will continue to be subject to the current fee schedules under Part 90 of our Rules. We note, however, that pending before Congress is H.R. 4522, the Federal Communications Commission Authorization Act of 1994. As reported by the Committee on Energy and Commerce of the House of Representatives, the legislation would commit to the Commission the authority to modify fees assessed pursuant to Section 8(b) of the Act. Any modification would be premised primarily on the costs relating to the processing of the application or filing. If enacted, the Commission's examination of filing fees for Part 90 and Part 22 applications would be done in this context.

4. *Regulatory Fees*

a. Background and Pleadings

311. In the Budget Act, Congress added new Section 9 to the Communications Act, which authorizes the Commission to collect annual regulatory fees from all Commission

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[569] Brown Comments at 19.

[570] *Id.* at 20; PCC Comments at 11.

[571] PCC Comments at 11-12.

[572] *Id.* at 12-13.

licensees to recover costs incurred in carrying out our regulatory activities.[573] In the *Further Notice*, we proposed to require all Part 90 CMRS licensees to pay the same per subscriber fee as other CMRS providers instead of the per-license fee established for private radio services.[574]

312. CTIA and McCaw support the proposal that all CMRS applicants in Part 90 services should be required to pay the same per-subscriber regulatory fee as other CMRS providers. They argue that such an approach is consistent with the congressional mandate to achieve regulatory symmetry.[575] Nextel favors uniformity of fees, but contends that any increased fee imposed on wide-area SMRs should be phased in over time.[576] NABER agrees that carriers providing similar services should be charged the same application and regulatory fees, but suggests that the Commission justify such charges based on the administrative costs incurred by the Commission.[577] RMD supports the proposed change in regulatory fees for all SMR licensees, including, but not limited to, CMRS operators, to a per subscriber basis.[578]

313. Brown contends that Section 9 of the Act, passed at the same time that Congress required regulatory parity, governs the regulatory fees for the services enumerated therein, and that the Commission is therefore bound to charge SMRs the enacted regulatory fee.[579] Pagemart opposes imposition of the same fee of $60 per 1000 subscribers on all CMRS licensees, claiming that the Commission has not demonstrated how the proposed fee would be necessary to cover Commission costs, how the Commission's processes would change, or how the increased costs would be reasonably related to the benefits provided to the private mobile service provider.[580]

b. Discussion

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[573] Budget Act, § 6003(a), *codified at* 47 U.S.C. § 159.

[574] *Further Notice*, 9 FCC Rcd at 2887 (para. 116).

[575] CTIA Comments at 5; McCaw Comments at 34.

[576] Nextel Comments at 48-49; Nextel Reply Comments at 42.

[577] NABER Comments at 40-41.

[578] RMD Comments at 12 (the change will necessitate a change in the application fee for such systems because under the new SMR application fee schedule, regulatory fees are embedded in the application fees for new licenses, renewals, and reinstatements).

[579] Brown Comments at 20.

[580] Pagemart Comments at 13-14.

314. Section 9(a) of the Communications Act requires the Commission to "assess and collect regulatory fees to recover the costs of . . . enforcement activities, policy and rulemaking activities, user information services, and international activities. . . ."[581] Section 9(b)(3) of the Act gives the Commission authority to "amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A). . . ."[582] Section 9(b)(1)(A) provides that any fees assessed pursuant to Section 9 "be derived by determining the full-time equivalent number of employees performing the activities described in subsection [9](a) . . ."[583]

315. In the *Fees Order*, we observed that any change to the regulatory fees schedule is conditioned on certain requirements.[584] Specifically, we noted that Section 9(i) of the Act requires the Commission to utilize accounting systems necessary to make adjustments to the fee schedule and to afford interested persons the opportunity to submit comments concerning the allocation of the costs of performing the functions described in Section 9(a)(1) among the services in the schedule.[585] Although we believe that principles of regulatory parity dictate that fees for similar services be equivalent, we have not yet determined the specific costs associated with our enforcement, policy, and rule making activities relating to the regulation of CMRS. In order to provide interested parties with the opportunity to comment on the costs associated with the regulation of CMRS, we will address these questions in a subsequent rule making proceeding concerning proposed changes to the regulatory fee schedule for fiscal year 1995. Until we take such action, the regulatory fee schedule contained in Section 9(g) of the Act remains in effect.[586]

5. *Public Notice and Petition To Deny Procedures for CMRS Applications*

a. Background and Pleadings

316. In the *Further Notice* , we explained that Section 309(b)(1) of the Act requires that common carrier applications and substantial amendments (other than minor amendments excepted under Section 309(c)) must be placed on public notice for 30 days prior to grant, and that subsection (d) of Section 309 permits the filing of petitions to deny during the public

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[581] Communications Act, § 9(a), 47 U.S.C. § 159(a).

[582] Communications Act, § 9(b)(3), 47 U.S.C. § 159(b)(3).

[583] Communications Act, § 9(b)(1)(A), 47 U.S.C. § 159(b)(1)(A).

[584] Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, MD Docket No. 94-19, Report and Order, FCC 94-140, at para. 11 (released June 8, 1994) (*Fees Order*).

[585] Communications Act, § 9(i), 47 U.S.C. § 159(i).

[586] Communications Act, § 9(g), 47 U.S.C. § 159(g).

notice period.[587] We therefore proposed to apply these statutory requirements, which are currently included in Part 22 of the Rules, to all CMRS applicants. In addition to initial license applications, we proposed to extend public notice and petition to deny procedures to applications for major modifications, and for assignments or transfers of control, of Part 90 CMRS licenses. We also sought comment regarding possible methods for applying these statutory requirements to reclassified CMRS licensees without unnecessarily delaying the speed and efficiency of the licensing process.[588]

317. Most of the commenters addressing these concerns support the proposal to apply public notice and petition to deny procedures to all CMRS services, and virtually all of these commenters concur that we are not authorized under the Communications Act to forbear from applying these application procedures.[589] Several commenters also provide suggestions for guarding against having the procedures delay the speed of our license processing.[590] Nearly all of these commenters submit that deterring frivolous protests will expedite the licensing process.[591] Some suggest that we accomplish this by strictly enforcing the statutory requirement that a petitioner have standing to protest an application.[592] Another suggestion is to apply the "greenmail" restrictions of Part 22, which prevent a person from receiving any more than his or her legitimate and prudent expenses in exchange for withdrawing an action, or threat thereof, against an application.[593] One commenter, APACG, recommends that we require litigants to supply draft orders along with their pleadings.[594] Another commenter, PageNet, advocates speeding up the Part 90 paging application process by commencing the frequency coordination process, as well as the processing of major amendments and

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[587] *Further Notice*, 9 FCC Rcd at 2887 (para. 117).

[588] *Id.* at 2887-88 (para. 118).

[589] *See, e.g.*, AMTA Comments at 37; APACG Comments at 6; Bell Atlantic Comments at 15; NABER Comments at 41; New Par Comments at 21-22; PageNet Comments at 33; PCIA Comments at 30; RMD Comments at 12; RMR Comments at 6-7 (unpaginated).

[590] *See, e.g.*, AMTA Comments at 37; Celpage Comments at 27; Metrocall Comments at 27; Network Comments at 27; PageNet Comments at 34; PCIA Comments at 33-34; RAM Tech Comments at 25-26.

[591] *See, e.g.*, Celpage Comments at 27; Metrocall Comments at 27; Network Comments at 27; PageNet Comments at 34; RAM Tech Comments at 25; RMR Comments at 7 (unpaginated).

[592] *See, e.g.*, Celpage Comments at 26; Metrocall Comments at 26; Network Comments at 26; RAM Tech Comments at 25-26.

[593] *See, e.g.*, Celpage Comments at 27; Metrocall Comments at 27; Network Comments at 27; PageNet Comments at 34; PCIA Comments at 33-34; RAM Tech Comments at 26.

[594] *See* APACG Comments at 6.

modification application, upon receipt of the filings, rather than waiting until the public notice period has expired.[595]

b. Discussion

318. We conclude that implementation of Section 309 of the Act requires that we amend Part 90 of the Rules to apply the public notice and petition to deny procedures set forth in Part 22 to all CMRS applications.[596] The Part 90 services to which these application procedures will apply are the SMR, 220 MHz, Business Radio, and Paging services that have been reclassified as CMRS. All other PMRS services will remain subject to application procedures currently contained in Part 90.

319. In addition, we find the commenters' suggestions concerning possible ways to minimize delay associated with the new processing requirements both informative and constructive. We are in complete agreement with the suggestion that the Part 22 "greenmail" restrictions be incorporated into Part 90 for CMRS licensees.[597] We established the policy, in the common carrier cellular radio service of restricting a petitioner's compensation to only those legitimate and prudent expenses incurred in reaching settlement, in order to deter frivolous protests, filed primarily for anticompetitive or abusive reasons. We believe the same policy should be pursued with regard to other CMRS services. Furthermore, incorporating these Part 22 provisions into Part 90 is within the scope of the proposal we made in the *Further Notice* to achieve regulatory symmetry among the CMRS services,[598]and at the same time, will not unnecessarily affect the speed and efficiency of the licensing process.[599] We also agree with those commenters who favor stricter enforcement of the standing requirement. Every petitioner is expected to meet all of our applicable procedural and filing requirements, including a demonstration that it has standing as a "party in interest," as a threshold obligation before putting forth objections to the application.[600] Failure to meet this obligation will result in summary dismissal of a petition to deny or other objection. Enforcing strict compliance with our procedural requirements, we believe, will effectively reduce processing delays caused by frivolous and ill-conceived petitions to deny and thus will assist in minimizing delays in offering CMRS service to the public. We are

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[595] *See* PageNet Comments at 33.

[596] *See* 47 CFR §§ 22.127, 22.130.

[597] *See* 47 CFR §§ 22.129, 22.936.

[598] *See Further Notice,* 9 FCC Rcd at 2865-66 (paras. 5-9).

[599] *Id.* at 2887-88 (para. 118).

[600] *See* Communications Act, § 309(d)(1), 47 U.S.C. § 309(d)(1); 47 CFR § 22.130.

therefore incorporating into Part 90 the procedural requirements contained in Section 22.130 of the Commission's Rules.[601]

320. We are not convinced, however, that requiring the parties in a proceeding involving a contested CMRS application to include draft orders with their pleadings would be beneficial. The additional time and expense of compiling and filing draft orders would not justify the small, if any, time savings that might result from such a requirement. As a general rule, the matters that we decide, because of their complexity, would not lend themselves to such a process. For example, it is likely that considerable time and effort on the part of Commission staff would be necessary to review and modify such draft orders.

321. Finally, as a general proposition, we agree with PageNet that application processing need not await termination of the public notice period, although we do not see the need for any rule change in this regard at this time. We do encourage our processing staff, however, to commence every processing procedure as quickly as possible, so long as doing so is not legally prohibited or impracticable.

6. *Mutually Exclusive Applications; Competitive Bidding*

a. General Background and Conclusions

322. The *Further Notice* tentatively concluded that competitive bidding procedures should generally be used to resolve competing CMRS applications where we have the authority to do so.[602] We acknowledged our obligation under Section 309(j)(6) of the Act to take steps to avoid mutual exclusivity in our application and licensing procedures, and thus we stated that we did not intend to preclude the use of first-come, first-served procedures, short filing windows, and similar procedures where appropriate. We also expressed our belief, however, that where we have the authority to select from among mutually exclusive applications by competitive bidding, it is generally advantageous to use reasonable filing windows that allow the filing of competing applications so that qualified applicants would not be excluded from consideration.[603]

323. The *Further Notice* generally proposed to continue the use of filing window procedures in Part 22 services, with some modifications, and to use competitive bidding to select a licensee from among mutually exclusive initial applications.[604] We also sought comment on whether we should adopt similar procedures for resolving mutually exclusive

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[601] 47 CFR § 22.130.

[602] *Further Notice*, 9 FCC Rcd at 2888 (para. 121).

[603] *Id.* (para. 122).

[604] *Id.* at 2888-89 (para. 123).

CMRS applications in Part 90 services subject to reclassification. We asked whether there are factors that may justify the use of different procedures, such as currently used first-come, first-served procedures, for some Part 90 services if a change in procedures would affect the availability of frequencies to PMRS as well as CMRS applicants.[605]

324. Prior to the adoption of the *Further Notice*, we had proposed in the Part 22 Rewrite proceeding to use first-come, first-served procedures for all Part 22 services.[606] Subsequent to the initiation of the Part 22 rule making, the Budget Act amended Section 309 of the Communications Act to authorize the Commission to use competitive bidding to choose among mutually exclusive initial applications. On April 20, 1994, we released the Second Report and Order in the competitive bidding proceeding, in which we decided to use competitive bidding to choose among mutually exclusive initial applications in most of the public mobile services governed by Part 22.[607] Subsequently, in the *Part 22 Rewrite Further Notice* we proposed to use a 30-day filing window and competitive bidding procedures to award 931 MHz paging authorizations from among mutually exclusive initial applications.[608]

325. In this proceeding, we take official notice of comments filed in response to the application filing and processing procedures proposed in the *Part 22 Rewrite Notice*.[609] The majority of commenters in the Part 22 rule making opposed the use of first-come, first-

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[605] *Id.* at 2889 (para. 124).

[606] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Notice of Proposed Rule Making, 7 FCC Rcd 3658, 3659 (1992) (*Part 22 Rewrite Notice).*

[607] The *Competitive Bidding Second Report and Order* declined to adopt the use of competitive bidding for Rural Radio Service, including Basic Exchange Telecommunications Service (BETRS), which is governed by Part 22. Implementation of Section 309 (j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2356 (1994) (*Competitive Bidding Second Report and Order*), *recon.*, Second Memorandum Opinion and Order, FCC 94-215, released Aug. 15, 1994.

[608] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Further Notice of Proposed Rule Making, FCC 94-103, released May 20, 1994 *(Part 22 Rewrite Further Notice).*

[609] *See* Revision of Part 22 of the Commission's Rules Governing the Public Mobile Service, CC Docket No. 92-115, Amendment of Part 22 of the Commission's Rules To Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service, CC Docket No. 94-46, Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, CC Docket No. 93-116, Report and Order, FCC 94-201, adopted Aug. 2, 1994 (*Part 22 Rewrite Order*).

served procedures for Part 22 services.[610] In the *Part 22 Rewrite Order* which we recently adopted, we decided to use 30-day notice and cut-off and competitive bidding procedures for the 931 MHz paging service.[611] For other CMRS applications governed by Part 22, we deferred a decision to this docket.[612]

326. In response to the *Further Notice* in this proceeding, both APACG and PCIA generally favor the use of 30-day filing windows and competitive bidding to select licensees from among mutually exclusive applications, rather than the use of first-come, first-served filing procedures. APACG points out that first-come, first-served licensing increases the chance that licensees will be "boxed in" by "strike" applicants and unable to file competing applications.[613] PCIA believes that first-come, first-served procedures would force existing operators to file for and construct facilities earlier than necessary merely to protect their anticipated market area from others who may file applications in order to prevent expansion by the existing operators or in the expectation that they will be able to sell the authorization to the existing operator at a profit.[614] Southern supports 30-day filing windows only for initial applications to create or expand service areas.[615]

327. PageNet supports the use of filing windows and competitive bidding only where new frequencies are being allocated, as in personal communications services (PCS). Otherwise, argues PageNet, first-come, first-served procedures should be used because they are easy and efficient, allowing the Commission to expedite service to the public. PageNet believes that filing windows enable applicants who are not ready and willing to build facilities to file mutually exclusive applications simply to frustrate the business plans of another applicant. Although PageNet acknowledges that the first-come, first-served process might exclude qualified applicants from consideration, it concludes that any procedure ultimately excludes qualified applicants if they do not prevail in the selection process.[616] AMTA and NABER also favor the use of first-come, first-served procedures for CMRS licenses.[617]

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[610] *See Part 22 Rewrite Order*, at para. 7 & nn. 14-19.

[611] *Id.* at paras. 95-100.

[612] *Id.* at para. 15.

[613] APACG Comments at 14.

[614] PCIA Comments at 31-32.

[615] Southern Reply Comments at 10.

[616] PageNet Comments at 34-39.

[617] AMTA Comments at 39; NABER Comments at 42.

328. As discussed more specifically below, we conclude that we should generally use notice and cut-off and competitive bidding procedures to select among mutually exclusive CMRS applications where we have the authority to do so and where we find such processing to be in the public interest. Under these procedures, an initial application, as defined by the service rules,[618] that is found to be acceptable for filing will be put on public notice. Any mutually exclusive initial applications that are filed no later than 30 days of that public notice date will be considered part of a filing group, and competitive bidding procedures will be used to select among them.[619] Any mutually exclusive initial application that is filed after the 30-day cut-off date will be unacceptable for filing and dismissed. In processing the mutually exclusive filing group, the applicant who submits the winning bid will have its application granted (if the applicant is found by the Commission to be qualified); all other applications will be dismissed.

329. We believe that it is generally advantageous to allow the filing of competing applications, thereby permitting two or more qualified applicants to be considered. Competitive bidding will ensure that the qualified applicant who places the highest value on the available spectrum will prevail in the selection process. We doubt, as PageNet suggests, that successful auction applicants will have filed competing applications unless they were ready and willing to build their proposed facilities. Further, although PageNet is correct that any processing procedure ultimately eliminates qualified applicants, we believe that the use of filing windows increases competitive opportunities and allows more qualified applicants to be considered. Finally, we do not think that we should use filing window and competitive bidding procedures only for newly allocated services such as PCS, as PageNet suggests, because new opportunities to provide service exist in established services as well. Thus, the same objectives would be served by using notice and cut-off procedures and competitive bidding in established services.

b. Part 22 Services

(1) *Background and Pleadings*

330. The *Further Notice* tentatively concluded that initial applications and certain major modifications in Part 22 services, except cellular unserved area Phase I applications, should be subject to 30-day filing windows and competitive bidding procedures used to choose among mutually exclusive applicants.[620] Although for most Part 22 services this procedure would represent a change from the 60-day filing windows currently used, we viewed 30 days notice as adequate for competitors to file mutually exclusive applications.

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[618] *See* discussion in paras. 354-359, *infra*, regarding initial and modification applications.

[619] *See* paras. 363-367, *infra*, regarding the processing of mutually exclusive initial and modification applications.

[620] *Further Notice*, 9 FCC Rcd at 2888-89 (para. 123).

Cellular unserved area Phase II applications would change from first-come, first-served to a 30-day window because we saw no reason to treat those applications differently than other Part 22 licensees. We proposed to continue the one-day filing window for cellular unserved area Phase I applications because those applications are accepted on a date certain that any potential applicant can determine well in advance of the filing window.

331. The commenting parties support adoption of a 30-day filing window for most Part 22 services,[621] except that most parties oppose its use for cellular unserved area Phase II applications. GTE contends that a 30-day window will delay the initiation of service.[622] Both GTE and McCaw argue that a 30-day window for these applications will increase the likelihood that speculative applications will be filed.[623] CECR concurs, arguing that if the objective is to reduce the likelihood of frivolous competing applications, first-come, first-served procedures would be a more efficient way to reduce the number of frivolous applications since competing applications generally would be less likely.[624] BellSouth, on the other hand, supports a 30-day window for Phase II applications because first-come, first-served rules hinder the filing of legitimate competing applications by incumbent carriers seeking to expand their service areas.[625] CECR also claims that our concern that first-come, first-served procedures would eliminate qualified applicants contradicts our finding in the cellular unserved area rule making that most applicants' proposals are "similar with respect to areas and population to be served. Their differences, if any, are of degree and not kind. . . ."[626] CECR suggests that our proposal for a 30-day window for Phase II applications is

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[621] *See, e.g.*, BellSouth Comments at 16-17 (supporting the general proposal because a 30-day filing window provides parties with notice of an application that may adversely affect their business plans and provides an opportunity to file competing applications).

[622] GTE Comments at 14-15.

[623] *Id.*; McCaw Comments at 36.

[624] CECR Comments at 2.

[625] BellSouth Comments at 17. BellSouth asks us to clarify that 30-day filing windows will not be created for cellular major modification applications. *Id.* Under our recently adopted revisions to Part 22, most major modifications to cellular systems do not trigger a 30-day notice and cut-off. *See, e.g.*, Section 22.947 (five-year build-out period for initial cellular systems in a market), Section 22.949(a) (Phase I cellular unserved area modification applications). Major modifications to systems awarded under Phase II cellular unserved area procedures, however, would be subject to a 30-day notice and cut-off. *See, e.g.*, Section 22.123(g)(2)).

[626] CECR Comments at 3, *citing* Amendment of Part 22 of the Commission's Rules To Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and To Modify Other Cellular Rules, CC Docket No. 85-388, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185, 6217 (1991) (*Cellular Unserved Areas Order*).

intended to maximize revenue, which is prohibited by Sections 309(j)(7)(A) and 309(j)(7)(B) of the Communications Act.

(2) *Discussion*

332. We will adopt 30-day notice and cut-off procedures for all CMRS governed by Part 22, except cellular unserved area Phase I applications, and we will use competitive bidding to select among mutually exclusive initial applications, as described in paragraphs 355-356, *infra*.[627] These procedures are supported by the record developed in this proceeding and will further our public interest goals of ensuring that all qualified applicants have an opportunity to compete for a license, and deterring the submission of speculative applications.

333. We believe that our decision to change cellular unserved area Phase II applications from first-come, first-served procedures to a 30-day notice and cut-off will allow all unserved area licensing to be conducted on a level competitive field even though the specific mechanism used for each phase is different. Any prospective applicant for Phase I can determine well in advance when the one-day filing window will occur because it is a date certain known to all potential competitors in advance. Thus, there is ample opportunity to file competing applications on the same day. First-come, first-served procedures by their very nature significantly decrease the possibility for competition among qualified applicants. A 30-day notice and cut-off, by contrast, provides essentially the same benefit to all similarly situated potential Phase II applicants as the Phase I procedure provides to earlier unserved applicants.[628] Although GTE is correct that a 30-day notice and cut-off may delay the initiation of service, we conclude that the benefits to be gained by using a 30-day notice and cut-off for Phase II outweigh this concern. Further, we have developed a competitive bidding system that allows us to award licenses expeditiously, thus avoiding unnecessary delays in initiating service.

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[627] Because we previously determined that Rural Radio Service, including Basic Exchange Telecommunications Service (BETRS), are fixed services and thus not CMRS, our decisions here regarding application filing and processing procedures do not apply to these services. *See CMRS Second Report and Order*, 9 FCC Rcd at 1454-55 (para. 102).

[628] We disagree with CECR's assertion that our desire to include more qualified applicants for consideration contradicts an earlier finding in the unserved area rule making. The passage cited by CECR explains why we declined to adopt comparative hearings, rather than random selection procedures, to choose among mutually exclusive applicants. It does not argue for eliminating qualified applicants from consideration. *See Cellular Unserved Area Order*, 6 FCC Rcd at 6217 ("[T]he comparative hearing process is ill suited for comparing substantially similar cellular system designs. We will revisit our decision to use lotteries for unserved area applications if we receive Congressional authority to conduct auctions.") (citations omitted).